

OHIO STATE LAW JOURNAL | FURTHERMORE
VOLUME 76**The Six Sides of Federalism in
*North Carolina Board of Dental Examiners v. FTC***

JAMES R. SAYWELL *

TABLE OF CONTENTS

I. INTRODUCTION	12
II. THE IMPORTANCE OF <i>BOARD OF DENTAL EXAMINERS</i>	13
III. THE SIX SIDES OF FEDERALISM IN STATE-ACTION IMMUNITY	15
IV. CONCLUSION.....	21

I. INTRODUCTION

States all over the country regulate using agencies made up of . . . well, real people. And these regulators often participate in the market they regulate. North Carolina, for instance, uses practicing dentists to regulate the dental market; elsewhere, states charge practicing lawyers with regulating the practice of law, and neurologists with regulating neurology. This practice creates a potential problem: the two-hatted private/public individuals may regulate the market to further their own interests rather than the market's interests, which violates the antitrust laws. A Supreme Court case this Term, *North Carolina Board of Dental Examiners v. FTC*, considers how to treat these two-hatted regulators.¹

The Federal Trade Commission (FTC) posits one solution: antitrust liability for the regulators unless the states actively supervise them (read: more bureaucracy at a higher level of government). But there is a better way; a federalism way. When viewed through the six sides of federalism—sides that too often go unaddressed by scholars and courts in this area²—the federal

* Law Clerk to Judge David W. McKeague (2014–2015); Law Clerk to Judge Jeffrey S. Sutton (2015–2016), both judges on the United States Court of Appeals for the Sixth Circuit. The views of this Case Comment do not necessarily reflect my employers. Thanks to my professor (and mentor) from The Ohio State University Moritz College of Law, Chris Walker. I wrote a more in-depth, law-review-esque version of this Comment as the final paper in his State and Local Government Law class. That version is available upon request.

¹ *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014). The case has been the subject of much discussion. *See e.g.*, Nina Totenberg, *Supreme Court Hears Arguments in Teeth Whitening Case*, NPR (Oct. 14, 2014, 4:03 PM), <http://www.npr.org/2014/10/14/356177201/supreme-court-hears-arguments-in-teeth-whitening-case>, *archived at* <http://perma.cc/M7CN-TVNY>.

² *See e.g.*, *Brazil v. Ark. State Bd. of Dental Exam'rs*, 759 F.2d 674, 675 (8th Cir. 1985) (“The District Court . . . held in favor of the immunity defense. Its opinion[, which did not address federalism,] is comprehensive and discriminating, and we have nothing of substance to add.”).

antitrust laws should not upset a state's chosen disposition of its power to regulate competition using its own agencies. A state regulatory board created by state law should *not* be treated as "private" merely because a majority of its members are market participants. The Supreme Court should reject the FTC's contrary approach.

II. THE IMPORTANCE OF *BOARD OF DENTAL EXAMINERS*

State and local governments often use anticompetitive market restraints through restrictive zoning, mandatory licensing schemes, and the like.³ The federal antitrust laws do the opposite by broadly *prohibiting* such policies.⁴ Which scheme, state or federal, prevails?

The state-action doctrine gives states the victory: The federal antitrust laws do not—and were never meant to—prevent states from regulating industry, including by prohibiting competition.⁵ But the problem comes in defining the "state."⁶ The "state" obviously includes a state's legislature or Supreme Court. And it obviously does *not* include a mere private citizen or corporation. But a large gap exists between those poles. State-authorized private actors, for instance, fall in that gap. They must meet certain preconditions—(1) act under "a clearly articulated and affirmatively expressed [] state policy" and (2) be "actively supervised by the state itself"—to constitute the "state" for antitrust-immunity purposes.⁷ Municipalities also fall within the gap. But they need only act under a clearly articulated state policy to gain immunity; a state does not need to actively supervise its cities.⁸

This much we know. But state boards and agencies like the one at issue in this case exist between the poles, and the Supreme Court has never held what preconditions (if any) they must follow to constitute the "state" in this context.⁹ Must they be actively supervised by a state itself—as state-authorized *private*

³ See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 15–34 (1982); GERALD FRUG ET AL., LOCAL GOVERNMENT LAW 618–54 (5th ed., 2010).

⁴ E.g., 15 U.S.C. § 1 (2012) (prohibiting "[e]very contract, combination . . . , or conspiracy" that unreasonably restrains "trade or [interstate] commerce").

⁵ Parker v. Brown, 317 U.S. 341, 351–52 (1943).

⁶ 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, § 226b, at 166 (3d ed. 2009) ("[D]etermining whether an actor is sufficiently 'public' so as not to require [state] supervision has often proven difficult."); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714 (1986) ("[D]ivining what constituted 'state action' proved not to be so simple.").

⁷ Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 (1980) (internal quotation marks omitted). These two prongs make up the so-called *Midcal* test.

⁸ Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).

⁹ But see *id.* at 46 n.10 (noting in dictum that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would [] not be required," but not "decid[ing] that issue" in the case).

parties—or is clear articulation of an anticompetitive state policy enough? Enter *North Carolina Board of Dental Examiners v. FTC*.

North Carolina appoints a “public” entity, the Board of Dental Examiners (Board), to enforce its clearly articulated,¹⁰ anticompetitive policy that only licensed dentists may practice dentistry.¹¹ It vests in the Board the “full power and authority to enact rules and regulations governing the practice of dentistry within the State.”¹² One such regulation is that only licensed dentists may “[r]emove stains, accretions or deposits from the human teeth.”¹³ When non-licensed individuals began to whiten teeth (which the Board argued constituted “remov[ing] stains, accretions or deposits”),¹⁴ the Board notified the non-dentists that it “is the state agency charged with regulating the practice of dentistry” and that it would “use any legal means at its disposal” to investigate the non-dentists’ practices.¹⁵ This notification, stamped with the State’s imprimatur, effectively forced non-dentists out of the teeth-whitening service in the State.¹⁶

The FTC called foul. It issued an administrative complaint against the Board, alleging that it had violated the antitrust laws by forcing non-dentists out of the teeth-whitening practice. The Board countered that it had immunity as the “State” under the state-action doctrine. It, after all, is *the* North Carolina state agency charged with regulating dentistry, and it acted under the State’s clearly articulated anticompetitive policy.

That was not enough for the FTC. Because the Board consisted of eight members, six of whom are private, practicing dentists, elected by other private, practicing dentists,¹⁷ the Administrative Law Judge and FTC disagreed with the Board’s immunity argument. They treated the Board as if it were a private entity, requiring it to show active state oversight to gain immunity.¹⁸ Lacking

¹⁰This is undisputed for purposes of this appeal.

¹¹N.C. GEN. STAT. § 90-22(b) (2014).

¹²*Id.* § 90-48.

¹³*Id.* §§ 90-29(b)(2); *see also id.* §§ 90-29(a), 90-30(a) (giving the Board the power to issue, suspend, or revoke dentistry licenses). The State also gives the Board quasi-legislative, executive, and judicial power. *E.g., id.* § 90-27.

¹⁴Whether whitening teeth *actually* falls within the Dental Practice Act is an open question of state law. Transcript of Oral Argument at 20, N.C. Bd. of Dental Exam’rs v. FTC, 134 S. Ct. 1491 (2014) (No. 13-534).

¹⁵Sasha Volokh, *How a State Dentistry Board Hounded Non-Dentist Teeth-Whiteners Out of North Carolina*, VOLOKH CONSPIRACY (Jan. 28, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/28/how-a-state-dentistry-board-hounded-non-dentist-teeth-whiteners-out-of-north-carolina/>, archived at <http://perma.cc/YNL5-PK8Y> (quoting a letter to a non-dentist provider).

¹⁶N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d, 359, 365 (4th Cir. 2013).

¹⁷N.C. GEN. STAT. § 90-22(b)–(c). The other two members consist of a dental hygienist and a consumer appointed by the Governor. *Id.*

¹⁸*See* Opinion of the Commission at 5–7, *In re* N.C. State Bd. of Dental Exam’rs, F.T.C. No. 9343 (Dec. 7, 2011), available at <http://www.ftc.gov/sites/default/files/>

such oversight, the Board would be liable under the antitrust laws. The Fourth Circuit agreed with this approach.¹⁹

To resolve a three-way circuit split, the Supreme Court granted certiorari to decide, in Justice Kagan’s characteristically pithy words, “whether th[is] entity is more like [a] private part[y] or is more like a prototypical State actor.”²⁰ The FTC argues that the Board is more like a private party because it contains private market participants, and thus that North Carolina must actively supervise it to gain immunity. The Board responds that it is more like a prototypical state actor, and thus that North Carolina’s clear articulation of an anticompetitive policy is enough to immunize it from antitrust suits. Who has the better argument?

III. THE SIX SIDES OF FEDERALISM IN STATE-ACTION IMMUNITY

Federalism offers at least six distinct ways of thinking about the question. All support rejecting the FTC’s overbroad approach, which would treat the Board as a private party even though the State treats it as a public entity.

(1) *Parker’s federalism roots*. The first aspect of federalism takes us back to where the state-action doctrine began. Over seventy years ago, California established a state commission to regulate the crops in the State. Similar to the Board here, state law mandated that six of the nine commission members were also private market participants.²¹ The commission acted anticompetitively by restricting the marketing activities of raisin growers.²² One raisin grower sued, pitting the federal antitrust laws against the State’s ability to regulate industry through its agencies.

documents/cases/2011/12/111207ncdentalopinon.pdf, *archived at* <http://perma.cc/3RH4-JMGN>.

¹⁹ *N.C. State Bd. of Dental Exam’rs*, 717 F.3d at 368–69. Judge Keenan concurred to emphasize that the court’s holding was limited to a state agency with a majority of private members who were also *elected* by private market participants. *Id.* at 376 (Keenan, J., concurring). This, however, conflicts with the FTC’s reasoning, *see* Transcript of Oral Argument, *supra* note 14, at 28, which advocates for a rule that *always* requires active supervision of financially interested public officials, without regard to their selection method. *See e.g.*, Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 689 (1991) (recommending such an approach). The Supreme Court could reject the FTC’s broad approach and still narrowly affirm by limiting its rule to instances where state boards are made up of private market participants *elected* by other private market participants. As explained below and depending on the narrowness of its holding, an opinion that affirms on this ground could still comport with the six sides of federalism.

²⁰ Transcript of Oral Argument, *supra* note 14, at 14.

²¹ *See Parker v. Brown*, 317 U.S. 341, 346 (1943) (citing 1939 Cal. Stat. 2488) (requiring the six members engage in the production of agricultural commodities as their principal occupation). Other market participants did not elect the members, however. Eight members were appointed by the governor and confirmed by the senate, and the ninth member was the Director of Agriculture. *Id.*

²² *Id.* at 350 (“[T]he California prorate program would violate the Sherman Act . . .”).

The Supreme Court sided with the State and its agency. The raising regulatory program, the Court said, “was never intended to operate by force of *individual* agreement or combination”; it existed instead only because the state legislature created it.²³ And although the Commission consisted of private market participants who proposed the anticompetitive program, “it [was] the *state*, acting through the Commission, which adopt[ed] the program” “in the execution of a *governmental policy*.”²⁴ The private members on the agency were merely part of the State’s choice in how it “exercises its legislative authority in . . . prescribing the conditions of [the regulatory program’s] application.”²⁵ Ditto for the North Carolina Board.

Future cases grew these federalism roots. It did not matter, therefore, that some “City Council members received advantages” for protecting a monopoly position;²⁶ state action was state action.²⁷ And while an “ancillary effect of [a state agency’s] policy, or even the conscious desire on its part, may [be] to benefit” its members, that does not “transmute the [agency]’s official actions into those of a private organization.”²⁸ If a state agency remains “public” even with the “conscious desire” to benefit its members, why doesn’t an agency remain public with market participants as members?

(2) *Federalism and statutory interpretation.* The second side of federalism in this case focuses on how to interpret the antitrust laws at issue here. A broad principle of statutory interpretation helps: “[F]ederal legislation threatening to trench on the States’ arrangements for conducting their own governments” is “treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power . . .”²⁹ That’s the antitrust laws here. North Carolina’s legislature chose to dispose of its power through a Board containing private market participants. Any federal law that “trench[es]” on that chosen disposition of power, we know, should be treated with “great skepticism.”³⁰

²³ *Id.* (emphasis added).

²⁴ *Id.* at 352; *see also id.* at 351 (“In a dual system of government . . . under the Constitution[] the states are sovereign . . .”).

²⁵ *Id.* at 352; *see also* S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 (1985) (“The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States’ ability to regulate their domestic commerce.”).

²⁶ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 367 (1991) (dealing with a city’s zoning ordinances).

²⁷ *See id.* at 374–79; *see also* *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984) (rejecting a reading of the antitrust laws that would allow plaintiffs to “look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign”).

²⁸ *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (rejecting claims suggesting that a State entity, “although a state agency by law acting in its official capacity, [is] somehow not a state agency because its official actions . . . benefited its member[s] by discouraging price competition”).

²⁹ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

³⁰ *Id.*

And Congress, through the antitrust laws, did not intend to prevent “a state *or its officers* or agents from [performing anticompetitive] activities directed by its legislature.”³¹ Statutory interpretation, then, also favors rejecting the FTC’s approach.

(3) *Structural State Sovereignty*. Each sovereign state, Federalist 45 tells us, retains power over “all the objects [that], in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”³² “It is an essential attribute of [this] retained sovereignty that [states] remain independent and autonomous within their proper sphere of authority.”³³ It follows, then, that a state has “vast leeway in the management of its internal affairs.”³⁴

This vast leeway enables states to structure their governments in various ways, including delegating authority to private members of state regulatory boards. A state’s structuring its government in this way is precisely how it “defines itself as a sovereign”—“[t]hrough the structure of its government[] and the character of those who exercise government authority.”³⁵ Sub-state entities, like the Board here, “are created as convenient *agencies* for exercising such of the *governmental powers of the State* as may be entrusted to them in its *absolute discretion*.”³⁶ The federal government must respect that sovereignty—not redefine it by requiring active supervision of a state’s own agencies.

State sovereignty is not just a doctrine of old. Just last Term, for example, the Court respected the sovereignty of Michigan in upholding its constitutional amendment banning affirmative action. In so doing, the Court did not require that Michigan take action at a particular level of government.³⁷ Rather, as

³¹ *Parker v. Brown*, 317 U.S. 341, 350–52 (1943) (“The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”).

³² THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003); *see also* U.S. CONST. amend. X; *Printz v. United States*, 521 U.S. 898, 921 (1997) (“This separation of the two spheres is one of the Constitution’s structural protections of liberty.”). This is the Justices Scalia and Thomas preferred view of federalism.

³³ *Printz*, 521 U.S. at 928–33 (invalidating a mandatory obligation imposed on local officials to perform background checks on prospective handgun purchasers as a violation of “the structural framework of dual sovereignty”).

³⁴ *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109 (1967) (holding that a State may constitutionally delegate to “subordinate governmental instrumentalities” that are not popularly elected); *see also Parker*, 317 U.S. at 352–54 (holding that the States were free to control its officers and agents according to the state legislature’s will).

³⁵ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also Nixon*, 541 U.S. at 140.

³⁶ *Nixon*, 541 U.S. at 140 (emphasis added) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991)).

³⁷ *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1635 (2014); *see also id.* at 1669 (Sotomayor, J., dissenting) (“The plurality embraces the freedom of ‘self-government’ without limits.”).

Justice Scalia underscored, “the near-limitless sovereignty of each State to design its governing structure as it sees fit” reigned supreme.³⁸

The antitrust laws are no exception. They allow states to remain as structural sovereigns, free to control its officers and agents according to its legislature’s will.³⁹ Since every state has the right to adopt anticompetitive laws—and the right to enforce those laws with public officials of its choosing—the FTC’s approach, which would subject state officials to federal scrutiny because of how the state legislature structured its regulatory enforcement, should be rejected.⁴⁰

(4) *States as Laboratories of Experimentation*. The fourth side of federalism is a familiar one. Federalism enables each state to “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴¹ North Carolina has “experiment[ed] with the appropriate allocation of state legislative power”⁴² by delegating some of that power to agencies containing private market participants. Privatization of state boards may or may not work.⁴³ But that is exactly the point: The experimentation of policies at a decentralized level (the Board here) *itself* represents the “great advantage” American democracy.⁴⁴ If privatization does not work, states may afterwards repair the problem with no real harm to the whole country.⁴⁵ But if it works, other states and even the federal government could repeat the experiment by

³⁸ *Id.* at 1646 (Scalia, J., concurring). States, he pointed out, “have ‘absolute discretion’ to determine the ‘number, nature and duration of the powers conferred upon [substate entities] and the territory over which they shall be exercised.’” *Id.* (quoting *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978)).

³⁹ *Parker*, 317 U.S. at 350–51.

⁴⁰ *But see* Sasha Volokh, *How Should the Supreme Court Decide the Dental Examiners Case?*, VOLOKH CONSPIRACY (Jan. 30, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/30/how-should-the-supreme-court-decide-the-dental-examiners-case/>, archived at <http://perma.cc/8XGR-YYGT>. He notes that “states are *not generally free* to structure how they implement their anticompetitive policies without having to worry about antitrust law.” *Id.* Quite true. States cannot, for example, delegate all anticompetitive regulatory power to General Motors and have GM gain immunity. But this is about how a State structures its own agencies and its own public officials—its own *government*—that only then carries out its anticompetitive policies. Unlike the GM hypothetical, the Board members are state officials in many ways. Indeed, *Parker* itself allowed close to such a result. *Parker*, 317 U.S. at 350–51.

⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is Justice Kennedy’s preferred view of federalism.

⁴² *Holt Civic Club*, 439 U.S. at 71.

⁴³ Volokh, *supra* note 40 (noting that there are privatization arguments on both sides of this case).

⁴⁴ *E.g.*, *Cnty. Comm’ns Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, C.J., dissenting) (disagreeing with the majority limiting the state-action antitrust doctrine, in part because “[t]his country’s municipalities will be unable to experiment with innovative social programs”); Alexis de Tocqueville, *Democracy in America*, in GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW* 3, 7 (5th ed. 2010).

⁴⁵ de Tocqueville, *supra* note 45, at 7.

implementing similar privatization policies in their respective agencies.⁴⁶ That is why we should value federalism so much: “innovations in governing or problem solving will occur that will inure to the benefit of the entire populace in the long run.”⁴⁷

The federal government should take care to respect these laboratories. Doing so means “be[ing] careful before imposing ‘inflexible . . . restraints that could circumscribe or handicap the continued research and experimentation.’”⁴⁸ Since we all benefit from state experimentation, the Supreme Court should reject the FTC’s laboratory-closing approach.

(5) *The Madison–de Tocqueville Compromise*. Recall that cities enforcing anticompetitive policies must act under a clearly articulated state policy but need not be centrally or actively supervised. This compromised immunity represents a balance between Madison’s fears of localities and de Tocqueville’s love of them.⁴⁹ Madison’s fears come alive when localities act anticompetitively because the localities may “seek to further purely parochial public interests at the expense of more overriding state goals.”⁵⁰ But fully enforcing the antitrust laws against these localities so as to *eliminate* that danger would be “folly”⁵¹—and it would eliminate de Tocqueville’s benefits of delegation to a lower level of government.⁵² So the Court employs a Madisonian compromise: “the *causes* of [this] faction cannot be removed,” but requiring clear articulation of an anticompetitive policy by the state controls its effects.⁵³

That same Madisonian compromise works for state boards with market-participant members. They too may seek to benefit their members over others and so they also require clear state articulation. Yet they too provide the benefits of regulation at a lower (and more intimate) level of government that de

⁴⁶ See *id.* (explaining how a bottom-up approach works best); cf. Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 706 (2011) (describing the dialogue between state and federal courts because of state experimentation).

⁴⁷ See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997) (explaining the value of having states as “innovators” and rebutting the counterarguments).

⁴⁸ Jeffrey S. Sutton, *Courts As Change Agents: Do We Want More—or Less?*, 127 HARV. L. REV. 1419, 1437 (2014) (book review) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973)).

⁴⁹ Accord Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 248 (1987) (agreeing that this balance works well).

⁵⁰ *Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985); cf. THE FEDERALIST NO. 10, *supra* note 32, at 45–47 (James Madison).

⁵¹ THE FEDERALIST NO. 10, *supra* note 32, at 46.

⁵² de Tocqueville, *supra* note 44, at 4–5.

⁵³ THE FEDERALIST NO. 10, *supra* note 32, at 48.

Tocqueville recognized.⁵⁴ So as not to annihilate their air—and quash the benefits of delegating down—states should not have to actively supervise their agencies merely because they contain market participants. Both Madison and de Tocqueville would be proud.

(6) *The Nationalist School of Federalism*. The five aspects of federalism already discussed lead to the sixth, one not common in most federalism literature: the “nationalist school of federalism.”⁵⁵ Imagine this: federalism benefits the federal government. But it’s true. State experimentation improves citizen participation and the national dialogue—here, the national dialogue on, say, privatization and competition in trade.⁵⁶ This, in turn, improves democratic discourse by allowing these specific debates to play out in real time.⁵⁷ And so federalism “enhances the opportunity of all citizens to participate in representative government, leading to benefits that after ‘engender[ing] and nurtur[ing] in the different States’ are then ‘applied to the country at large.’”⁵⁸ Additionally, all government benefits from the lower enforcement costs resulting from a reduced need to monitor the States—here, a reduced need to monitor down two levels: the federal government does not need to monitor the States, and the States do not need to monitor their own agencies. Coming full circle, federalism benefits the federal government too, and this side of federalism provides a sixth reason to reject the FTC’s approach.

⁵⁴ de Tocqueville, *supra* note 44, at 4–5. As pointed out at oral argument, this may be especially beneficial for agencies that regulate sensitive areas such as brain surgeons. Transcript of Oral Argument, *supra* note 14, at 31–32.

⁵⁵ Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–72 (2010) [hereinafter Gerken, *All the Way Down*]. This was recently on display in a *Yale Law Journal* Feature. The Feature’s essential point is that courts and scholars should no longer view federalism as longer a conservative doctrine; it benefits everyone in vast ways. See generally Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L. REV. 1889 (2014) [hereinafter Gerken, *New Nationalism*], available at <http://www.yalelawjournal.org/essay/federalism-as-the-new-nationalism-an-overview>, archived at <http://perma.cc/L4RX-PDSM>.

⁵⁶ Gerken, *New Nationalism*, *supra* note 55, at 1894 (the different state “structural arrangements help tee up national debates, accommodate political competition, and work through normative conflict.”); see also Gerken, *All the Way Down*, *supra* note 55, at 24–28 (explaining how state agencies can foster national debate).

⁵⁷ Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) (explaining how federalism unites the national polity by allowing specific debates to play out).

⁵⁸ Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 789–90 (1982) (O’Connor, J., concurring in part and dissenting in part) (quoting 1 Alexis de Tocqueville, DEMOCRACY IN AMERICA 181 (Henry Reeve trans., 1961)); see also Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853–56 (1979) (“[T]he freedom to participate in the community’s political life [] is the core of democratic government.”).

IV. CONCLUSION

This Term, the Court will confront the dilemma caused by real-people regulators—the doctors, lawyers, and, yes, dentists, that fill many of our state regulatory agencies. These people may regulate for their own good rather than the good of the market, so the Court properly puts some checks on them. But the Court’s state-action doctrine—and its accompanying six sides of federalism identified in this Comment—should prevent the federal government from over-checking the States as the FTC desires.

The FTC’s argument is not all bad, though. Its apparent ignorance of the six sides of federalism highlights the need for the doctrine, now over seventy-years old, to visit the Supreme Court for a shot in the arm. Let *North Carolina Board of Dental Examiners v. FTC* be the syringe.